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## **[AMENDED AND RESTATED] VOTING AGREEMENT**

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## [AMENDED AND RESTATED] VOTING AGREEMENT

THIS [AMENDED AND RESTATED] VOTING AGREEMENT (the “**Agreement**”) is made and entered into as of this [\_\_\_] day of [\_\_\_\_\_, 20\_\_\_], by and among [\_\_\_\_], a [California] corporation (the “**Company**”), each holder of the Company’s Series A Preferred Stock [and Series [\_\_\_] Preferred Stock] (“**Preferred Stock**”) listed on Schedule A (together with any subsequent investors, or transferees, who become parties hereto as “**Investors**” pursuant to Sections 6.1[(a)] and 6.2 below, the “**Investors**”) and those certain shareholders of the Company and holders of options to acquire shares of the capital stock of the Company listed on Schedule B (together with any subsequent shareholders or option holders, or any transferees, who become parties hereto as “**Key Holders**” pursuant to Section[s] 6.1(b) and 6.2 below (the “**Key Holders**”<sup>1</sup>), and together collectively with the Investors, the “**Shareholders**”).

### RECITALS

A. [Alternative 1:<sup>2</sup>] Concurrently with the execution of this Agreement, the Company and the Investors are entering into a Series A Preferred Stock Purchase Agreement (the “**Purchase Agreement**”) providing for the sale of shares of the Company’s Series A Preferred Stock, and in connection with that agreement the parties desire to provide the Investors with the right, among other rights, to elect certain members of the board of directors of the Company (the “**Board**”) in accordance with the terms of this Agreement.<sup>3</sup>

A. [Alternative 2:<sup>4</sup>] Concurrently with the execution of this Agreement, the Company and the certain of the Investors are entering into a Series [B] Preferred Stock Purchase Agreement (the “**Purchase Agreement**”) providing for the sale of shares of the Company’s Series B Preferred Stock (“**Series B Preferred Stock**”). Certain of the Investors (the “**Existing Investors**”) and the Key Holders are parties to the Voting Agreement dated [\_\_\_\_] by and among the Company and the parties thereto (the “**Prior Agreement**”). The parties to the Prior Agreement desire to amend and restate that agreement to provide those Investors purchasing shares of the Company’s Series [B] Preferred Stock with the right, among other rights, to elect certain members of the board of directors of the Company (the “**Board**”) in accordance with the terms of this Agreement.

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<sup>1</sup> In most cases investors will want the term “Key Holders” to include major common stock or option holders in addition to the individuals who actually founded the Company.

<sup>2</sup> The first alternative for the recital paragraph A assumes that the agreement concerns the sale of the Company’s first series of preferred stock.

<sup>3</sup> Section 706(a) of the Corporations Code, as amended in 1997, specifically allows voting agreements among shareholders, provided such agreements are in writing and signed by the parties thereto.

<sup>4</sup> The second alternative for recital paragraph A assumes that a preexisting voting agreement is being superseded. It contemplates two or more different series of preferred stock. In the remainder of this Agreement, brackets indicate places where the drafter will have to take account of the existence of multiple series.

B. The Amended and Restated Articles of Incorporation of the Company (the “**Restated Articles**”) provides that (a) the holders of record of the shares of the Company’s Series A Preferred Stock (“**Series A Preferred Stock**”), exclusively and as a separate class, shall be entitled to elect [\_\_\_\_] directors of the Company (the “**Series A Directors**”) [and the holders of record of the shares of Series [B] Preferred Stock shall be entitled to elect [\_\_\_\_] directors of the Company]; [(b) the holders of record of the shares of common stock of the Company, [\_\_\_\_] par value (“**Common Stock**”), exclusively and as a separate class, shall be entitled to elect [\_\_\_\_] directors of the Company;] and (c) the holders of record of the shares of Common Stock and of any other class or series of voting stock (including Series A [and B] Preferred Stock), exclusively and voting together as a single class, shall be entitled to elect the balance of the total number of directors of the Company.<sup>5</sup>

[C. The parties also desire to enter into this Agreement to set forth their agreements and understandings with respect to how shares of the Company’s capital stock held by them will be voted on[, or tendered in connection with, an acquisition of the Company] [an increase in the number of shares of Common Stock required to provide for the conversion of the Company’s Preferred Stock.]]

NOW, THEREFORE, the parties agree as follows:

1. Voting Provisions Regarding Board of Directors.<sup>6</sup>

[1.1 Size of the Board. Each Shareholder agrees to vote, or cause to be voted, all Shares (as defined below) owned by such Shareholder, or over which such Shareholder has voting control, from time to time and at all times, in whatever manner as shall be necessary to ensure that the size of the Board shall be set and remain at [five (5)] directors.]<sup>7</sup> For purposes of this Agreement, the term “**Shares**” shall mean and include any securities of the Company the holders of which are entitled to vote for members of the Board, including without limitation, all shares of Common Stock, Series A Preferred Stock[, and Series B Preferred Stock], by whatever name called, now owned or subsequently acquired by a Shareholder, however acquired, whether through stock splits, stock dividends, reclassifications, recapitalizations, similar events or otherwise.

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<sup>5</sup> Appropriate modifications to this form will be required to reflect the actual series of preferred stock outstanding and the relative rights of such series.

<sup>6</sup> Careful consideration should be given to ensure that the voting agreement does not contradict class or series votes created by the charter. In particular, if the charter provides for the creation of an additional series (*e.g.*, Series A-1) to effectuate “pay-to-play” provisions, care should be taken to ensure that such shares are also included in the appropriate places in this Agreement. In addition, consider the effects that cumulative voting may have on the class and series votes created by the charter.

<sup>7</sup> In some companies, the charter or bylaws fix the size of the board or set a permissible range. Depending upon the amendment provision of the charter, placing this provision in the voting agreement may give additional protection to some parties. A California corporation may not have fewer than three (3) directors when there are three (3) or more shareholders under Section 212(a) of the Corporations Code.

1.2 Board Composition. Each Shareholder agrees to vote, or cause to be voted, all Shares owned by such Shareholder, or over which such Shareholder has voting control, from time to time and at all times, in whatever manner as shall be necessary to ensure that at each annual or special meeting of shareholders at which an election of directors is held or pursuant to any written consent of the shareholders, the following persons shall be elected to the Board:<sup>8</sup>

(a) At each election of directors in which the holders of the Series A Preferred Stock, voting as a separate class, are entitled to elect [two] directors of the Company, (i) one individual designated by [*Investor 1*] [so long as such Investor holds not fewer than [ ] shares of Series A Preferred Stock (as adjusted for any stock splits, stock dividends, recapitalizations or the like)], which individual shall initially be [ ], and (ii) one individual designated by [*Investor 2*] [so long as such Investor holds not fewer than [ ] shares of Series A Preferred Stock (as adjusted for any stock splits, stock dividends, recapitalizations or the like)], which individual shall initially be [ ];

(b) [*Alternative 1:* For so long as the Key Holders hold at least [ ] shares of Common Stock (as adjusted for any stock splits, stock dividends, recapitalizations or the like), one individual designated by the holders of a majority of the Shares of Common Stock [held by the Key Holders], which individual shall initially be [ ];

[*Alternative 2:* [*name of Key Holder*], for so long as [*name of Key Holder*] [remains an [officer] [employee] of the Company] [holds at least [ ] Shares (as adjusted for stock splits, stock dividends, recapitalizations or the like)] [holds at least [ ]% of the outstanding capital stock of the Company on an as-converted-to-Common Stock basis] [, except that if [*name of Key Holder*] declines or is unable to serve, his or her successor shall be designated by [*name of alternate Key Holder*] [the holders of a majority of the shares of Common Stock of the Company];<sup>9</sup>

(c) The Company's Chief Executive Officer, who shall initially be [ ] (the "**CEO Director**"), provided that if for any reason the CEO Director shall cease to serve as the Chief Executive Officer of the Company, each of the Shareholders shall promptly vote their respective Shares (i) to remove the former Chief Executive Officer from the Board if such person has not resigned as a member of the Board and (ii)

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<sup>8</sup> The number of permutations of board composition are almost limitless. Some of the more common requirements are set forth in Section 1.2.

<sup>9</sup> Careful consideration should be given whenever an individual is named to serve as a director who may have the ability to continue to serve at his or her pleasure. Alternative 1 provides that a founder director shall be elected by the majority of the Key Holders' shares or the shares of common stock, depending upon which alternative is selected, but in fact the designated founder may have sufficient shares of stock to control that vote. Alternative 2 has a variety of choices: the first ties the Board seat to continued status as an officer or employee, which may be within the control of the majority of the board of directors; the other alternatives tie the right to designate a director only to continued minimum holdings of stock.

to elect such person's replacement as Chief Executive Officer of the Company as the new CEO Director; and

(d) One individual not otherwise an Affiliate (defined below) of the Company or of any Investor who is [mutually acceptable to (i) the holders of a majority of the Shares held by the Key Holders who are then providing services to the Company as officers, employees or consultants and (ii) the holders of a majority of the Shares held by the Investors][mutually acceptable to the other members of the Board]; and

(e) To the extent that any of clauses (a) through (d) above shall not be applicable, any member of the Board who would otherwise have been designated in accordance with the terms thereof shall instead be voted upon by all the shareholders of the Company entitled to vote thereon in accordance with, and pursuant to, the Company's Restated Articles.

For purposes of this Agreement, an individual, firm, corporation, partnership, association, limited liability company, trust or any other entity (collectively, a "**Person**") shall be deemed an "**Affiliate**" of another Person who, directly or indirectly, controls, is controlled by or is under common control with such Person, including, without limitation, any partner, officer, director, member or employee of such Person and any venture capital fund now or hereafter existing that is controlled by or under common control with one or more general partners of or shares the same management company with such Person.

1.3 Failure to Designate a Board Member. In the absence of any designation from the persons or groups with the right to designate a director as specified above, the director previously designated by them and then serving shall be reelected if still eligible to serve as provided herein.

1.4 Removal of Board Members. Each Shareholder also agrees to vote, or cause to be voted, all Shares owned by such Shareholder, or over which such Shareholder has voting control, from time to time and at all times, in whatever manner as shall be necessary to ensure that:

(a) no director elected pursuant to Sections 1.2 or 1.3 of this Agreement may be removed from office [other than for cause] unless (i) such removal is directed or approved by the affirmative vote of the Person, or of the holders of [*specify percentage*] of the shares of stock, entitled under Section 1.2 to designate that director<sup>10</sup> or (ii) the Person(s) originally entitled to designate or approve such director [or occupy such Board seat] pursuant to Section 1.2 is no longer so entitled to designate or approve such director [or occupy such Board seat]; and

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<sup>10</sup> Alternatively, the agreement can enumerate the identity of each group whose consent is necessary to remove each director, but care should be given to ensure that the consent requirements conform to the exact subsets entitled to designate directors, *e.g.*, "the holders of a majority of the Shares held by the Key Holders who are then providing services to the Company as officers, employees or consultants."

(b) any vacancies created by the resignation, removal or death of a director elected pursuant to Sections 1.2 or 1.3 shall be filled pursuant to the provisions of this Section 1.<sup>11</sup>

All Shareholders agree to execute any written consents required to perform the obligations of this Agreement, and the Company agrees at the request of any party entitled to designate directors to call a special meeting of shareholders for the purpose of electing directors. [So long as the shareholders of the Company are entitled to cumulative voting, if less than the entire Board is to be removed, no director may be removed without cause if the votes cast against his or her removal would be sufficient to elect such director if then cumulatively voted at an election of the entire Board.]

1.5 No Liability for Election of Recommended Directors. No party, nor any Affiliate of any such party, shall have any liability as a result of designating a person for election as a director for any act or omission by such designated person in his or her capacity as a director of the Company, nor shall any party have any liability as a result of voting for any such designee in accordance with the provisions of this Agreement.

[2. Vote to Increase Authorized Common Stock. Each Shareholder agrees to vote or cause to be voted all Shares owned by such Shareholder, or over which such Shareholder has voting control, from time to time and at all times, in whatever manner as shall be necessary to increase the number of authorized shares of Common Stock from time to time to ensure that there will be sufficient shares of Common Stock available for conversion of all of the shares of Preferred Stock outstanding at any given time.]

[3. Drag-Along Right.<sup>12</sup>

3.1 Definitions. A “**Sale of the Company**” shall mean either: (a) a transaction or series of related transactions in which a Person, or a group of related Persons, acquires from shareholders of the Company shares representing more than fifty percent (50%) of the outstanding voting power of the Company (a “**Stock Sale**”); or (b) a transaction that qualifies as a “**Deemed Liquidation Event**” as defined in the Restated Articles.

3.2 Actions to be Taken. In the event that the holders of [*specify percentage*]<sup>13</sup> of the outstanding shares of Common Stock issued or issuable upon conversion of the

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<sup>11</sup> For flexibility reasons it may be useful to permit the Board to fill the vacancy in addition to the right of the shareholders to do so. If so, the drafter should provide that the person to fill the vacancy must be approved by the Person who has the right to nominate that director pursuant to this Voting Agreement, and should take care that the provision is in accord with the Articles of Incorporation, the bylaws and the Corporations Code. See Section 305 of the Corporations Code.

<sup>12</sup> A drag-along right gives a defined group of shareholders the right to deliver all (or most) of the shares of a company without the need of effecting a freeze-out merger. The drafter should be mindful of the interplay between this provision and minority protections against changes in control that may be in the Articles of Incorporation or the Investor Rights Agreement. Drag-along rights are less common than voting agreements regarding the composition of the board of directors, which are near universal. If a drag-along right is to be included, it sometimes does not come into effect until a few years after the date of the voting agreement.

shares of Series A [and B] Preferred Stock (the “**Selling Investors**”) [and the Board] approve a Sale of the Company in writing, specifying that this Section 3 shall apply to such transaction, then each Shareholder hereby agrees:

(a) if such transaction requires shareholder approval, with respect to all Shares that such Shareholder owns or over which such Shareholder otherwise exercises voting power, to vote (in person, by proxy or by action by written consent, as applicable) all Shares in favor of, and adopt, such Sale of the Company and to vote in opposition to any and all other proposals that could [reasonably be expected to] delay or impair the ability of the Company to consummate such Sale of the Company;

(b) if such transaction is a Stock Sale, to sell the same proportion of shares of capital stock of the Company beneficially held by such Shareholder as is being sold by the Selling Investors to the Person to whom the Selling Investors propose to sell their Shares, and, except as permitted in Section 3.3 below, on the same terms and conditions as the Selling Investors;

(c) to execute and deliver all related documentation and take such other action in support of the Sale of the Company as shall reasonably be requested by the Company or the Selling Investors in order to carry out the terms and provision of this Section 3, including without limitation executing and delivering instruments of conveyance and transfer, and any purchase agreement, merger agreement, indemnity agreement, escrow agreement, consent, waiver, governmental filing, share certificates duly endorsed for transfer (free and clear of impermissible liens, claims and encumbrances) and any similar or related documents;

(d) not to deposit, and to cause their Affiliates not to deposit, except as provided in this Agreement, any Shares of the Company owned by such party or Affiliate in a voting trust or subject any Shares to any arrangement or agreement with respect to the voting of such Shares, unless specifically requested to do so by the acquiror in connection with the Sale of the Company; and

(e) to refrain from exercising any dissenters’ rights or rights of appraisal under applicable law at any time with respect to such Sale of the Company.

3.3 Exceptions. Notwithstanding the forgoing, a Shareholder will not be required to comply with Section 3.2 above in connection with any proposed Sale of the Company (the “**Proposed Sale**”) unless:

(a) any representations and warranties to be made by such Shareholder in connection with the Proposed Sale are limited to representations and warranties related to authority, ownership and the ability to convey title to such Shares, including but not

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<sup>13</sup> The percentage vote required to trigger the drag-along provision should not differ from the percentage vote the Preferred Shareholders have negotiated in order to authorize a Sale of the Company. That is, the percentage vote required should comport with both the protective provisions in the charter relating to a Sale of the Company, and with the vote of the holders of Preferred Stock that is required by applicable law.



limited to representations and warranties that (i) the Shareholder holds all right, title and interest in and to the Shares such Shareholder purports to hold, free and clear of all liens and encumbrances, (ii) the obligations of the Shareholder in connection with the transaction have been duly authorized, if applicable, (iii) the documents to be entered into by the Shareholder have been duly executed by the Shareholder and delivered to the acquirer and are enforceable against the Shareholder in accordance with their respective terms and (iv) neither the execution and delivery of documents to be entered into in connection with the transaction, nor the performance of the Shareholder's obligations thereunder, will cause a breach or violation of the terms of any agreement, law or judgment, order or decree of any court or governmental agency;

(b) The Shareholder shall not be liable for the inaccuracy of any representation or warranty made by any other Person in connection with the Proposed Sale, other than the Company;

(c) the liability for indemnification, if any, of such Shareholder in the Proposed Sale and for the inaccuracy of any representations and warranties made by the Company in connection with such Proposed Sale, is several and not joint with any other Person, and is pro rata in accordance with such Shareholder's relative stock ownership of the Company;

(d) liability shall be limited to the amount of consideration actually paid to such Shareholder in connection with such Proposed Sale, except with respect to (i) representations and warranties of such Shareholder related to authority, ownership and the ability to convey title to such Shares, (ii) any covenants made by such Shareholder with respect to confidentiality or voting related to the Proposed Sale or (iii) claims related to fraud or willful breach by such Shareholder, the liability for which need not be limited;

(e) upon the consummation of the Proposed Sale, (i) each holder of each series of the Company's Preferred Stock and each holder of Common Stock will receive the same form of consideration for their shares of Common and Preferred Stock, (ii) each holder of a series of Preferred Stock will receive the same amount of consideration per share of such series of Preferred Stock, (iii) each holder of Common Stock will receive the same amount of consideration per share of Common Stock, and (iv) unless the holders of at least *[specify percentage]*<sup>14</sup> of the [Series A Preferred Stock] elect otherwise by written notice given to the Company at least [\_\_\_] days prior to the effective date of any such Proposed Sale, the aggregate consideration receivable by all holders of the Preferred Stock and Common Stock shall be allocated among the holders of Preferred Stock and Common Stock on the basis of the relative liquidation preferences to which the holders of each respective series of Preferred Stock and the holders of Common Stock are entitled in a Deemed Liquidation Event (assuming for this purpose

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<sup>14</sup> The vote required to waive the treatment of a particular transaction as a Deemed Liquidation Event should comport with the vote that would be required to amend the charter to remove the transaction from the definition of "Deemed Liquidation Event" and the notice period in this sentence should be the same as the notice period in the Deemed Liquidation Event definition in the articles.

that the Proposed Sale is a Deemed Liquidation Event) in accordance with the Company's Articles of Incorporation in effect immediately prior to the Proposed Sale; and

(f) subject to clause (e) above, requiring the same form of consideration to be received by the holders of the Company's Common and Preferred Stock, if any holders of any capital stock of the Company are given an option as to the form and amount of consideration to be received as a result of the Proposed Sale, all holders of such capital stock will be given the same option.

3.4 Restrictions on Sales of Control of the Company.<sup>15</sup> No Shareholder shall be a party to any Stock Sale unless all holders of Preferred Stock are allowed to participate in such transaction and the consideration received pursuant to such transaction is allocated among the parties thereto in the manner specified in the Company's Articles of Incorporation in effect immediately prior to the Stock Sale (as if such transaction were a Deemed Liquidation Event), unless the holders of at least [*specify percentage*]<sup>16</sup> of the [Series A Preferred Stock] elect otherwise by written notice given to the Company at least [\_\_\_] days prior to the effective date of any such transaction or series of related transactions.

#### 4. Remedies.

4.1 Covenants of the Company. The Company agrees to use its best efforts, within the requirements of applicable law, to ensure that the rights granted under this Agreement are effective and that the parties enjoy the benefits of this Agreement. Such actions include, without limitation, the use of the Company's best efforts to cause the nomination and election of the directors as provided in this Agreement.

[4.2 Irrevocable Proxy. Each party to this Agreement hereby constitutes and appoints the other parties hereto, and each of them, with full power of substitution, as the proxies of the party with respect to the matters set forth herein, including without limitation, election of persons as members of the Board in accordance with Section 1 hereto[, votes to increase authorized shares pursuant to Section 2 hereof] [ and votes regarding any Sale of the Company pursuant to Section 3 hereof], and hereby authorizes each of them to represent and to vote, if and only if the party (i) fails to vote or (ii) attempts to vote (whether by proxy, in person or by written

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<sup>15</sup> The reason for this provision is that the "Deemed Liquidation Event" provisions of the articles cannot completely provide for the allocation of the purchase price paid in a sale of the Company if the sale is structured as a sale of stock by the Company's shareholders. This is because the Company may not be a party to the stock sale transaction and will not have the opportunity to ensure that the purchase price is allocated as dictated in the charter. This covenant is intended to prevent a group of controlling shareholders from circumventing the liquidation preference provision by structuring the sale as a stock sale if those shareholders do not otherwise have sufficient voting power to amend the definition of a "Deemed Liquidation Event." Co-sale provisions do not provide adequate protection for such a scenario either because (a) the co-sale right does not apply to the holders of preferred stock or (b), if co-sale rights do apply, the preferred shareholders exercising those rights might receive the same purchase price for their preferred stock as the selling common shareholders receive for this common stock, thereby losing the benefits of their liquidation preferences.

<sup>16</sup> See Footnote 13.

consent), in a manner which is inconsistent with the terms of this Agreement, all of such party's Shares in favor of the election of persons as members of the Board determined pursuant to and in accordance with the terms and provisions of this Agreement[ or the increase of authorized shares or approval of any Sale of the Company pursuant to and in accordance with the terms and provisions of Sections 2 and 3, respectively, of this Agreement]. The proxy granted pursuant to the immediately preceding sentence is given in consideration of the agreements and covenants of the Company and the parties in connection with the transactions contemplated by this Agreement and, as such, is coupled with an interest and shall be irrevocable unless and until this Agreement terminates or expires pursuant to Section 5 hereof. Each party hereto hereby revokes any and all previous proxies with respect to the Shares and shall not hereafter, unless and until this Agreement terminates or expires pursuant to Section 5 hereof, purport to grant any other proxy or power of attorney with respect to any of the Shares, deposit any of the Shares into a voting trust or enter into any agreement (other than this Agreement), arrangement or understanding with any person, directly or indirectly, to vote, grant any proxy or give instructions with respect to the voting of any of the Shares, in each case, with respect to any of the matters set forth herein.]]<sup>17</sup>

4.3 Specific Enforcement.<sup>18</sup> Each party acknowledges and agrees that each party hereto will be irreparably damaged in the event any of the provisions of this Agreement are not performed by the parties in accordance with their specific terms or are otherwise breached. Accordingly, it is agreed that each of the Company and the Shareholders shall be entitled to an injunction to prevent breaches of this Agreement, and to specific enforcement of this Agreement and its terms and provisions in any action instituted in any court of the United States or any state having subject matter jurisdiction.

4.4 Remedies Cumulative. All remedies, either under this Agreement or by law or otherwise afforded to any party, shall be cumulative and not alternative.

5. Term. This Agreement shall be effective as of the date hereof and shall continue in effect until and shall terminate upon the earliest to occur of (a) the consummation of the Company's first underwritten public offering of its Common Stock<sup>19</sup> (other than a registration state-

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<sup>17</sup> The proxy is intended to give the holder of voting rights a tool to force other shareholders to abide by the terms of this Agreement, even if the other shareholders do not agree or refuse to take the action the holder requires. Many shareholders will not give up the right to determine if the actions sought to be taken by the holder of voting rights are in accord with the terms of this Agreement. There may be a difference of opinion, for example, as to whether a proposed sale of the Company meets all conditions sufficient to fall with the definition of that term. Some practitioners believe the proxy would likely be used in situations when there is a dispute as to which actions are required, and that any exercise of the proxy could be hazardous to the holder of the right at that time. Accordingly, the proxy may not be very useful in the very situations when it might be invoked.

<sup>18</sup> Section 706(a) of the Corporations Code implies that specific performance is the preferred remedy in the case of voting agreements.

<sup>19</sup> Some voting agreements require a "qualified public offering" for the termination of the agreement. The blocking rights contained in the charter, however, should provide sufficient protection to the Investors. Retaining a "qualified public offering" requirement in the voting agreement creates possible blocking rights for individual investors not contemplated by the charter, and in any event gives rise to the need to obtain additional waivers and consents when one should be sufficient. The termination provision should conform to that in the Right (continued...)

ment relating either to the sale of securities to employees of the Company pursuant to its stock option, stock purchase or similar plan or an SEC Rule 145 transaction), (b) the consummation of a Sale of the Company, (c) termination of this Agreement in accordance with Section 6.8 below [and (d) \_\_\_\_\_, 20\_\_].

6. Miscellaneous.

6.1 Additional Investors.

(a) Notwithstanding anything to the contrary contained herein, if the Company issues additional shares of Series [\_\_\_\_\_] Preferred Stock after the date hereof, as a condition to the issuance of such shares the Company shall require that any purchaser of at least \_\_\_\_\_ shares of Series [\_\_\_\_\_] Preferred Stock become a party to this Agreement by executing and delivering (i) the Adoption Agreement attached to this Agreement as Exhibit A, or (ii) a counterpart signature page hereto agreeing to be bound by and subject to the terms of this Agreement as an Investor and Shareholder hereunder. In either event, each such person shall thereafter shall be deemed an Investor and Shareholder for all purposes under this Agreement.

[(b) In the event that after the date of this Agreement, the Company enters into an agreement with any Person to issue shares of capital stock to such Person (other than to a purchaser of Preferred Stock described in Section 6.1(a) above), [following which such Person shall hold Shares constituting one percent (1%) or more of the Company's then outstanding capital stock (treating for this purpose all shares of Common Stock issuable upon exercise of or conversion of outstanding options, warrants or convertible securities, as if exercised and/or converted or exchanged)], then, the Company shall cause such Person, as a condition precedent to entering into such agreement, to become a party to this Agreement by executing an Adoption Agreement in the form attached hereto as Exhibit A, agreeing to be bound by and subject to the terms of this Agreement as a Shareholder and thereafter such person shall be deemed a Shareholder for all purposes under this Agreement.]<sup>20</sup>

6.2 Transfers. Each transferee or assignee of any Shares subject to this Agreement shall continue to be subject to the terms hereof, and, as a condition precedent to the Company's recognizing such transfer, each transferee or assignee shall agree in writing to be subject to each of the terms of this Agreement by executing and delivering an Adoption Agreement substantially in the form attached hereto as Exhibit A. Upon the execution and delivery of an Adoption Agreement by any transferee, such transferee shall be deemed to be a party hereto as if such transferee were the transferor and such transferee's signature appeared on the signature pages of this Agreement and shall be deemed to be an Investor and Shareholder, or Key Holder

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of First Refusal and Co-sale Agreement and the Investors' Rights Agreement (other than the registration rights termination provision).

<sup>20</sup> This requirement cannot apply to any shares issued to an employee, director or consultant to which California Department of Corporations rules 260.140.41(l) or 260.140.42(i) and 260.140.1 apply (e.g., shares exempt from qualification by offering, issuance and sale pursuant to an option plan or agreement that meets the requirements of Section 25102(o) of the Corporations Code). Voting rights for such shares must not be unequally restricted.

and Shareholder, as applicable. The Company shall not permit the transfer of the Shares subject to this Agreement on its books or issue a new certificate representing any such Shares unless and until such transferee shall have complied with the terms of this Section 6.2. Each certificate representing the Shares subject to this Agreement if issued on or after the date of this Agreement shall be endorsed by the Company with the legend set forth in Section 6.12.

6.3 Successors and Assigns. The terms and conditions of this Agreement shall inure to the benefit of and be binding upon the respective successors and assigns of the parties. Nothing in this Agreement, express or implied, is intended to confer upon any party other than the parties hereto or their respective successors and assigns any rights, remedies, obligations, or liabilities under or by reason of this Agreement, except as expressly provided in this Agreement.

6.4 Governing Law. This Agreement shall be governed by and construed in accordance with the [General Corporation Law of the State of Delaware] as to matters within the scope thereof, and as to all other matters shall be governed by and construed in accordance with the internal laws of [*state of principal place of business*], without regard to its principles of conflicts of laws.

6.5 Counterparts; Facsimile. This Agreement may be executed and delivered by facsimile signature and in two or more counterparts, each of which shall be deemed an original, but all of which together shall constitute one and the same instrument.

6.6 Titles and Subtitles. The titles and subtitles used in this Agreement are used for convenience only and are not to be considered in construing or interpreting this Agreement.

6.7 Notices. All notices and other communications given or made pursuant to this Agreement shall be in writing and shall be deemed effectively given: (a) upon personal delivery to the party to be notified, (b) when sent by confirmed electronic mail or facsimile if sent during normal business hours of the recipient, and if not so confirmed, then on the next business day, (c) five (5) days after having been sent by registered or certified mail, return receipt requested, postage prepaid, or (d) one (1) day after deposit with a nationally recognized overnight courier, specifying next day delivery, with written verification of receipt. All communications shall be sent to the respective parties at their address as set forth on Schedule A or Schedule B hereto, or to such email address, facsimile number or address as subsequently modified by written notice given in accordance with this Section 6.7. If notice is given to the Company, a copy shall also be sent to [*Company Counsel Name and Address*] and if notice is given to Shareholders, a copy shall also be given to [*Investor Counsel Name and Address*].

6.8 Consent Required to Amend, Terminate or Waive.<sup>21</sup> This Agreement may be amended or modified and the observance of any term hereof may be waived (either generally or in a particular instance and either retroactively or prospectively) only by a written instrument

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<sup>21</sup> To the extent there are rights of individual parties to designate directors, care should be taken to ensure that the amendment section requires the vote of such party to amend the relevant sections of the document.

executed by (a) the Key Holders holding [*specify percentage*] of the Shares then held by the Key Holders [provided that such consent shall not be required if the Key Holders do not then own Shares representing at least [\_\_]% of the outstanding capital stock of the Company] [who are then providing services to the Company as officers, employees or consultants] and (b) the holders of [*specify percentage*] of the shares of Common Stock issued or issuable upon conversion of the shares of Series A [and B] Preferred Stock held by the Investors (voting as a single class and on an as-converted basis). Notwithstanding the foregoing:

(i) this Agreement may not be amended or terminated and the observance of any term of this Agreement may not be waived with respect to any Investor or Key Holder without the written consent of such Investor or Key Holder unless such amendment, termination or waiver applies to all Investors or Key Holders, as the case may be, in the same fashion;

(ii) the consent of the Key Holders shall not be required for any amendment or waiver if such amendment or waiver does not apply to the Key Holders;

(iii) Schedules A and B hereto may be amended by the Company from time to time in accordance with Section 1.3 of the Purchase Agreement to add information regarding additional Investors (as defined in the Purchase Agreement) without the consent of the other parties hereto;

(iv) any provision hereof may be waived by the waiving party on such party's own behalf, without the consent of any other party[]; and

(v) Section 1.2(a) of this Agreement shall not be amended or waived without the written consent of [*Investor 1*] and [*Investor 2*] and Section 1.2(b) of this Agreement shall not be amended or waived without the written consent of [the Key Holders] [the holders of [*specify percentage*] of shares of Common Stock].

The Company shall give prompt written notice of any amendment, termination or waiver hereunder to any party that did not consent in writing thereto. Any amendment, termination or waiver effected in accordance with this Section 6.8 shall be binding on each party and all of such party's successors and permitted assigns, whether or not any such party, successor or assignee entered into or approved such amendment, termination or waiver.

6.9 Delays or Omissions. No delay or omission to exercise any right, power or remedy accruing to any party under this Agreement, upon any breach or default of any other party under this Agreement, shall impair any such right, power or remedy of such non-breaching or non-defaulting party nor shall it be construed to be a waiver of any such breach or default, or an acquiescence therein, or of or in any similar breach or default thereafter occurring; nor shall any waiver of any single breach or default be deemed a waiver of any other breach or default previously or thereafter occurring. Any waiver, permit, consent or approval of any kind or character on the part of any party of any breach or default under this Agreement, or any waiver on the part of any party of any provisions or conditions of this Agreement, must be in writing and shall be effective only to the extent specifically set forth in such writing. All remedies, either under this Agreement or by law or otherwise afforded to any party, shall be cumulative and not alternative.

6.10 Severability. The invalidity or unenforceability of any provision hereof shall in no way affect the validity or enforceability of any other provision.

6.11 Entire Agreement. [Upon the effectiveness of this Agreement, the Prior Agreement shall be deemed amended and restated to read in its entirety as set forth in this Agreement.<sup>22</sup>] This Agreement (including the Exhibits hereto), [and] the Restated Articles [and the other Transaction Agreements (as defined in the Purchase Agreement)] constitute the full and entire understanding and agreement between the parties with respect to the subject matter hereof, and any other written or oral agreement relating to the subject matter hereof existing between the parties are expressly canceled.

6.12 Legend on Share Certificates. Each certificate representing any Shares issued after the date hereof shall be endorsed by the Company with a legend reading substantially as follows:

“THE SHARES EVIDENCED HEREBY ARE SUBJECT TO A VOTING AGREEMENT, AS MAY BE AMENDED FROM TIME TO TIME, (A COPY OF WHICH MAY BE OBTAINED UPON WRITTEN REQUEST FROM THE COMPANY), AND BY ACCEPTING ANY INTEREST IN SUCH SHARES THE PERSON ACCEPTING SUCH INTEREST SHALL BE DEEMED TO AGREE TO AND SHALL BECOME BOUND BY ALL THE PROVISIONS OF THAT VOTING AGREEMENT, INCLUDING CERTAIN RESTRICTIONS ON TRANSFER AND OWNERSHIP SET FORTH THEREIN.”

The Company, by its execution of this Agreement, agrees that it will cause the certificates evidencing the Shares issued after the date hereof to bear the legend required by this Section 6.12 of this Agreement, and it shall supply, free of charge, a copy of this Agreement to any holder of a certificate evidencing Shares upon written request from such holder to the Company at its principal office. The parties to this Agreement do hereby agree that the failure to cause the certificates evidencing the Shares to bear the legend required by this Section 6.12 herein and/or the failure of the Company to supply, free of charge, a copy of this Agreement as provided hereunder shall not affect the validity or enforcement of this Agreement.

6.13 Stock Splits, Stock Dividends, etc. In the event of any issuance of Shares of the Company's voting securities hereafter to any of the Shareholders (including, without limitation, in connection with any stock split, stock dividend, recapitalization, reorganization, or the like), such Shares shall become subject to this Agreement and shall be endorsed with the legend set forth in Section 6.12.

6.14 Manner of Voting. The voting of Shares pursuant to this Agreement may be effected in person, by proxy, by written consent or in any other manner permitted by applicable law.

6.15 Further Assurances. At any time or from time to time after the date hereof, the parties agree to cooperate with each other, and at the request of any other party, to

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<sup>22</sup> The drafter should ensure that the relevant signatories to the current agreement have authority to terminate the prior agreement under the terms of the latter.

execute and deliver any further instruments or documents and to take all such further action as the other party may reasonably request in order to evidence or effectuate the consummation of the transactions contemplated hereby and to otherwise carry out the intent of the parties hereunder.

6.16 Dispute Resolution.<sup>23</sup> The parties (a) hereby irrevocably and unconditionally submit to the jurisdiction of the state courts of [state] and to the jurisdiction of the United States District Court for the District of [judicial district] for the purpose of any suit, action or other proceeding arising out of or based upon this Agreement, (b) agree not to commence any suit, action or other proceeding arising out of or based upon this Agreement except in the state courts of [state] or the United States District Court for the District of [judicial district], and (c) hereby waive, and agree not to assert, by way of motion, as a defense, or otherwise, in any such suit, action or proceeding, any claim that it is not subject personally to the jurisdiction of the above-named courts, that its property is exempt or immune from attachment or execution, that the suit, action or proceeding is brought in an inconvenient forum, that the venue of the suit, action or proceeding is improper or that this Agreement or the subject matter hereof may not be enforced in or by such court. [Alternative: Any unresolved controversy or claim arising out of or relating to this Agreement, except as (i) otherwise provided in this Agreement, or (ii) any such controversies or claims arising out of either party's intellectual property rights for which a provisional remedy or equitable relief is sought, shall be submitted to arbitration by one arbitrator mutually agreed upon by the parties, and if no agreement can be reached within thirty (30) days after names of potential arbitrators have been proposed by the American Arbitration Association (the "AAA"), then by one arbitrator having reasonable experience in corporate finance transactions of the type provided for in this Agreement and who is chosen by the AAA. The arbitration shall take place in [location], in accordance with the AAA rules then in effect, and judgment upon any award rendered in such arbitration will be binding and may be entered in any court having jurisdiction thereof. There shall be limited discovery prior to the arbitration hearing as follows: (a) exchange of witness lists and copies of documentary evidence and documents relating to or arising out of the issues to be arbitrated, (b) depositions of all party witnesses and (c) such other depositions as may be allowed by the arbitrators upon a showing of good cause. Depositions shall be conducted in accordance with the [State] Code of Civil Procedure, the arbitrator shall be required to provide in writing to the parties the basis for the award or order of such arbitrator, and a court reporter shall record all hearings, with such record constituting the official transcript of such proceedings. [Each party will bear its own costs in respect of any disputes arising under this Agreement.] [The prevailing party shall be entitled to reasonable attorney's fees, costs, and necessary disbursements in addition to any other relief to which such party may be entitled.] Each of the parties to this Agreement consents to personal jurisdiction for any equitable action sought in the U.S. District Court for the District of [\_\_\_\_\_] or any court of the [State][Commonwealth] of [State] having subject matter jurisdiction.

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<sup>23</sup> Although the evidence is only anecdotal, many members of the Model Documents Working Group expressed a preference for litigation rather than arbitration. In the experience of some, contrary to its reputation, arbitration can be even slower and more expensive than litigation. However, if arbitration is not selected, note that pre-dispute jury trial waivers are not currently enforceable in California in light of the California Supreme Court's decision in Grafton Partners, L.P. v. Sup. Ct., Case 123344 (August 4, 2005).



[6.17 Costs of Enforcement. If any party to this Agreement seeks to enforce its rights under this Agreement by legal proceedings, the non-prevailing party shall pay all costs and expenses incurred by the prevailing party, including, without limitation, all reasonable attorneys' fees.]

[6.18 Consent of Spouse or Registered Domestic Partner. If any individual Shareholder is married or is a California registered domestic partner on the date of this Agreement, such Shareholder's spouse or registered domestic partner shall execute and deliver to the Company a consent of spouse or registered domestic partner in the form of Exhibit B hereto ("**Consent**"), effective on the date hereof. Notwithstanding the execution and delivery thereof, such Consent shall not be deemed to confer or convey to the spouse or registered domestic partner any rights in such Shareholder's Shares that do not otherwise exist by operation of law or the agreement of the parties. If any individual Shareholder should marry, remarry, register or re-register as a California domestic partner subsequent to the date of this Agreement, such Shareholder shall within thirty (30) days thereafter obtain his/her new spouse's or registered domestic partner's acknowledgement of and consent to the existence and binding effect of all restrictions contained in this Agreement by causing such spouse or registered domestic partner to execute and deliver a Consent acknowledging the restrictions and obligations contained in this Agreement and agreeing and consenting to the same.]<sup>24</sup>

[Signature Page Follows]

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<sup>24</sup> To the extent any Key Holder or spouse thereof is a resident of Arizona, California, Idaho, Louisiana, Nevada, New Mexico, Texas, Washington, or Wisconsin, or the Commonwealth of Puerto Rico, a Consent may be needed. The necessity of such a Consent should be researched carefully, since including this provision where the law is unclear may imply the existence of rights that would not otherwise exist. Effective January 1, 2005, registered domestic partners in California are entitled to all of the same rights, protections and benefits as are granted to spouses, including by operation of community property laws, pursuant to the Domestic Partner Rights and Responsibilities Act of 2003 (Cal. Fam. Code Section 297 et seq.). See Exhibit B. However, this is an evolving area of the law.

IN WITNESS WHEREOF, the parties have executed this [Amended and Restated] Voting Agreement as of the date first written above.

*[Insert Company Name]*

By: \_\_\_\_\_  
Name: \_\_\_\_\_  
Title: \_\_\_\_\_

KEY HOLDERS:

By: \_\_\_\_\_  
Name: \_\_\_\_\_  
Title: \_\_\_\_\_

INVESTORS:

By: \_\_\_\_\_  
Name: \_\_\_\_\_  
Title: \_\_\_\_\_

**SCHEDULE A**

**INVESTORS**

**Name and Address**

**Number of Shares Held**

**SCHEDULE B**

**KEY HOLDERS**

**Name and Address**

**Number of Shares Held**

## **EXHIBIT A**

### **ADOPTION AGREEMENT**

This Adoption Agreement (“**Adoption Agreement**”) is executed on \_\_\_\_\_, 20\_\_, by the undersigned (the “**Holder**”) pursuant to the terms of that certain Voting Agreement dated as of [\_\_\_\_\_, 20\_\_] (the “**Agreement**”), by and among the Company and certain of its Shareholders, as such Agreement may be amended or amended and restated hereafter. Capitalized terms used but not defined in this Adoption Agreement shall have the respective meanings ascribed to such terms in the Agreement. By the execution of this Adoption Agreement, the Holder agrees as follows.

1.1 Acknowledgement. Holder acknowledges that Holder is acquiring certain shares of the capital stock of the Company (the “**Stock**”)[ or options, warrants or other rights to purchase such Stock (the “**Options**”)], for one of the following reasons (Check the correct box):

- ☐ as a transferee of Shares from a party in such party’s capacity as an “Investor” bound by the Agreement, and after such transfer, Holder shall be considered an “Investor” and a “Shareholder” for all purposes of the Agreement.
- ☐ as a transferee of Shares from a party in such party’s capacity as a “Key Holder” bound by the Agreement, and after such transfer, Holder shall be considered a “Key Holder” and a “Shareholder” for all purposes of the Agreement.
- ☐ as a new Investor in accordance with Section 6.1(a) of the Agreement, in which case Holder will be an “Investor” and a “Shareholder” for all purposes of the Agreement.
- ☐ in accordance with Section 6.1(b) of the Agreement, as a new party who is not a new Investor, in which case Holder will be a “Shareholder” for all purposes of the Agreement.

1.2 Agreement. Holder hereby (a) agrees that the Stock [Options], and any other shares of capital stock or securities required by the Agreement to be bound thereby, shall be bound by and subject to the terms of the Agreement and (b) adopts the Agreement with the same force and effect as if Holder were originally a party thereto.

1.3 Notice. Any notice required or permitted by the Agreement shall be given to Holder at the address or facsimile number listed below Holder’s signature hereto.

**HOLDER:** \_\_\_\_\_

ACCEPTED AND AGREED:

By: \_\_\_\_\_  
Name and Title of Signatory

**[COMPANY]**

Address: \_\_\_\_\_

By: \_\_\_\_\_

Title: \_\_\_\_\_

Facsimile Number: \_\_\_\_\_

**[EXHIBIT B**

**CONSENT OF SPOUSE OR REGISTERED DOMESTIC PARTNER**

I, [\_\_\_\_\_, spouse or California registered domestic partner of [\_\_\_\_\_, acknowledge that I have read the [Amended and Restated] Voting Agreement, dated as of [\_\_\_\_\_, 20\_\_\_\_], to which this Consent is attached as Exhibit B (the “**Agreement**”), and that I know the contents of the Agreement. I am aware that the Agreement contains provisions regarding the voting and transfer of shares of capital stock of the Company that my spouse may own, including any interest I might have therein.

I hereby agree that my interest, if any, in any shares of capital stock of the Company subject to the Agreement shall be irrevocably bound by the Agreement and further understand and agree that any community property interest I may have in such shares of capital stock of the Company shall be similarly bound by the Agreement.

I am aware that the legal, financial and related matters contained in the Agreement are complex and that I am free to seek independent professional guidance or counsel with respect to this Consent. I have either sought such guidance or counsel or determined after reviewing the Agreement carefully that I will waive such right.

Dated: \_\_\_\_\_

\_\_\_\_\_  
*[Name of Key Holder’s Spouse or Registered Domestic Partner, if any]*